IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 233.

HENRY F. BEAN AND JOHN W. ALSOP, APPELLANTS,

against

WILLIAM L. PATTERSON, MARY MILLER, WILLIAM MILLER, ELI J. SAEGER, MELCHOR H. HORN, VALENTINE W. WEAVER, WILLIAM B. POWELL, ED. E. POWELL, AND THE NATIONAL BANK OF CATASAUQUA, PENNSYLVANIA, APPELLEES.

Appeal from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

STATEMENT AND BRIEF FOR APPELLEES.

G. G. VEST,
For Appellees.

JUDD & DETWEILER, PRINTERS.

the rights of appellants had become vested by their action at law, and their proceedings in equity to set aside the deed. The failure to take the depositions of William Miller and Mary Miller, and the absence of all other testimony on these facts, must be taken as proof that they do not exist. In addition to the authorities already cited we refer to the following:

Earl v. Champion, 65 Pa. St., 191.
Clark v. Roesencranz, 31 N. J. Eq., 665.
Howe v. Colby, 19 Wis., 583.
Eddy v. Baldwin, 23 Mo., 596.
Eddy v. Baldwin, 32 Mo., 369.
Potter v. McDowell, 31 Mo., 69.
Pauley v. Vogel, 42 Mo., 300.
Woodford v. Stephens, 51 Mo., 445.
Stivers v. Home, 62 Mo., 474.
Kidwell v. Kirkpatrick, 70 Mo., 216.
Leavitt v. Laforce, 71 Mo., 353.

The master's report shows that the annual value of the rents and products of the land in controversy is $1,455, and the record shows that defendant Saeger *et al.* have been in possession of the land, realizing and receiving those rents and products since 1876, or eleven years. The total amount of those rents and products for eleven years thus received by Saeger et al. is $16,005, and Saeger *et al.* having received that amount in satisfaction to that extent of their debt by means of the assignment to them of the fraudulent deed of trust to Mrs. Miller, the appellants who have received nothing as yet, and who have been "hindered and delayed" for thirteen years, should now have a decree against the land itself, according to the prayer of their bill.

In conclusion we submit that this court should reverse the decree of the court below, adjudge the Mary Miller deed of trust to be fraudulent and void, and direct the court below to decree accordingly.

JAMES S. BOTSFORD,
M. T. C. WILLIAMS,
For Appellants.

122-496

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Appeal from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

STATEMENT.

This is a suit in equity to set aside as fraudulent a certain deed of trust on 920 acres of land in Atchison county, Missouri, given by William Miller and wife on November 10, 1873, to William L. Patterson, as trustee, to secure to Mary Miller, the wife of William Miller, the sum of $16,000.

On October 21, 1874, these appellants brought an attachment suit in the circuit court of Atchison county, Missouri,

against William Miller, on the ground of non-residence, and caused the said 920 acres of land, together with 160 acres of other lands, to be levied upon under said attachment, and in aid of said attachment suit commenced the present suit on October 23, 1874, against Patterson, the trustee, and William and Mary Miller, as defendants. Appellee Eli J. Saeger having acquired the said deed of trust, and the indebtedness thereby secured, by assignment from Mary Miller, he was made a defendant in this cause by an amended petition filed on December 11, 1876, and afterwards by a further amended petition filed on the 28th day of January, 1880, in the same court, the remaining defendants were made parties to this suit; and at the May term, 1880, of the Atchison circuit court the cause was removed to the United States circuit court for the western division of the western district of Missouri, where, after due proceedings had, a judgment was rendered sustaining the validity of said deed of trust, from which judgment the plaintiffs prosecute this appeal.

Taking the facts in their historical order, as they are disclosed by the evidence in the record, it appears that William Miller had been engaged in a general mercantile business in the town of Catasauqua, in Pennsylvania, for some time prior to 1857, and had been successful in business, and so continued for several years after that time, when he engaged in contracting for the raising of minerals in Pennsylvania, in which business he also prospered, and made considerable money. He then engaged in railroad contracting, and made large sums on different roads, and about 1868 had large contracts upon the Union Pacific railroad, from which he made about $100,000 (Record, pp. 192, 186, 133). On the 9th of November, 1865, Mary Miller acquired by deed from one Thomas and wife the title to a certain tract of ground in Catasauqua, Pennsylvania, which deed contains the following language: "To have and to hold the said lot or piece of ground, hereditaments and premises, hereby granted or mentioned, or intended so to be, with the appurtenances,

unto the said party of the *second part*, *his* heirs and assigns, to and for the only proper use and behoof of the said party of the second part, *his* heirs and assigns, forever." (Record, p. 197.)

On February 26, 1866, Mrs. Miller also acquired by deed from Horn and wife a certain other tract of land in Catasauqua, Pennsylvania, which deed also contains this clause: "To have and to hold, etc., unto the said party of the second part, her heirs and assigns, to and for the only proper use and behoof of the said party of the second part, her heirs and assigns, forever." (Record, p. 198.)

And on April 1, 1868, Mrs. Miller acquired a further piece of property in Catasauqua by deed from Koons and wife, which contained the same provision as the last-mentioned deed. (Record, p. 204.)

On February the 14th, 1870, Mrs. Miller acquired the title to a tract of land in Atchison county, Missouri, containing about 520 acres and known as the "Ramsey farm." The deed to this farm did not create a separate estate in equity, and the land conveyed was Mrs. Miller's statutory separate property. (Record, p. 72.)

It may be conceded that William Miller, the husband of Mary Miller, paid for these several tracts of land conveyed to her; there is, however, no evidence in the case to show that at the time of these several conveyances he was indebted, nor is there any evidence to indicate any fraudulent purpose or intent in purchasing these several properties for his wife.

In December, 1870, nearly a year after the last of these conveyances, William Miller procured, through the appellee, Eli J. Saeger, a loan of $25,000 from Jay Cooke & Co., and gave his note, payable to the order of Saeger, who endorsed the same. This note was renewed from time to time at periods of ninety days, and on September 28th, 1871, William Miller, to secure said indebtedness, gave a deed of trust

to Saeger upon the lands in controversy in this suit. (See deed of trust, pp. 79, 80 of the Record.)

At the time of procuring this loan from Jay Cooke & Co., in December, 1870, Mrs. Miller, together with her husband, executed to Saeger as further security an obligation in the sum of $20,000, conditioned for the payment of $10,000, in six months after the date thereof, with legal interest, and to secure said obligation also executed to Saeger a mortgage upon her several pieces of property in Catasauqua before mentioned, (see this mortgage on pp. 141, 142 of the Record, see also testimony of Saeger, Record, pp. 181, 182). This indebtedness remained unpaid to Cooke, and the above-mentioned deed of trust and mortgage remained in force as liens upon the property of William Miller in Missouri and of Mrs. Miller in Pennsylvania until it was satisfied from moneys realized upon the property of Mrs. Miller.

About December the 1st, 1871, the appellee, M. H. Horn, who was the cashier of the National Bank of Catasauqua, negotiated a loan with the Penn Mutual Life Insurance Company of Philadelphia for $12,500, which was also secured by a mortgage upon the property of Mrs. Miller in Catasauqua. The net proceeds of this loan were $11,747.15. This debt was secured by a mortgage on the property of Mrs. Miller in Catasauqua, and the proceeds were applied upon the Cooke note about January, 1872. (Record, pp. 182, 187, 189.)

On the 23d of February, 1872, Mrs. Miller conveyed the "Ramsey farm," in Missouri, to Saeger, Horn, and one V. W. Weaver for the purpose of raising money to pay off the Cooke note; the consideration was $5,000 in cash and $6,000 of stock in the Allentown Rolling-Mill Company, which was disposed of for $5,000, making the cash proceeds of the sale of the farm $10,000, (Record, p. 189); and the same was applied on the Cooke note, (Record, p. 181). By deeds made on the 3d of March, 1873, and the 23d of May, 1873, Mrs. Miller and her husband sold her property in Catasauqua,

which was still encumbered by the mortgages to Saeger and the Penn Insurance Company before mentioned, and also another piece of property in Catasauqua belonging to William Miller, for the purpose of raising money to pay off the loan which had been procured from the Penn Insurance Company. (Record, pp. 201, 205, 182, 187, 188, 189, 190, and 196.)

These sales were negotiated and conducted by M. H. Horn, who received and applied the proceeds. The amount realized from these sales of her Catasauqua property was $14,000; $8,000 for one piece and $6,000 for another, (Record, p. 189). Horn conducted all the transactions for the settlement of these several loans which had been secured by the property of Mrs. Miller, and no part of the proceeds of the Ramsey farm in Missouri, nor of the Catasauqua property ever passed into the custody of William Miller, although Horn, being the cashier of the bank, placed the same to the credit of William Miller, and then charged it up on account of these several notes, or the checks given for their payment, (Record, pp. 189, 191, 196). The last of the indebtedness to the Penn Insurance Company, which had taken the place of part of the Cooke note, was thus satisfied about July, 1873. On the 10th day of November, 1873, William Miller executed a deed of trust, in which his wife joined, to William L. Patterson, as trustee, to secure to his wife the sum of $16,000 of the proceeds of her property used in paying off his indebtedness above mentioned. The deed recited that "said sum had been realized and received by said William Miller from the sale of individual property of said Mary Miller, and used by him in the payment for the real estate hereinbefore mentioned and described, and to secure the indebtedness of the said William Miller on account thereof," and conveyed the same lands upon which the deed of trust had been executed in favor of Saeger in September, 1871, except that 160 acres were omitted from the last deed of trust. (Record, p. 139.)

This deed of November, 1873, for the benefit of Mrs. Miller, is the one sought to be annulled by this suit. The appellants claim by their bill (Record, p. 25), that their indebtedness against William Miller arose upon a contract entered into between them and Miller in August, 1873, for the performance of certain work and labor thereunder in the years 1873 and 1874, and that a large amount was due on said contract at the time of making the said deed of trust to Patterson for the benefit of Mrs. Miller, but there is no evidence in the record to show the amount of any indebtedness from William Miller to the appellants, nor when the same accrued, other than the transcript of the attachment suit by these appellants against Miller, commencing at page 106 of the record of those proceedings. None of the defendants, appellees in this suit, except William Miller, were parties to that suit, nor is there any evidence to indicate any fraudulent intent on the part of William Miller in making said deed of trust for the benefit of his wife in November, 1873, and especially is there no evidence to indicate any intention on the part of Mrs. Miller to aid in any fraudulent design against the creditors of her husband, or to do anything else than to secure herself. The evidence concerning the solvency of William Miller relates almost entirely to the time after the institution of this suit, and is confined principally to the testimony of John P. Lewis, one of the attorneys for the plaintiffs (Record, pp. 59 to 69), and that which he was able to give upon the subject was not his own knowledge of facts, but simply hearsay. The whole scope of his testimony upon this subject is embodied in the following statement, to be found on page 61 of the record: "Since the institution of the present suit I have made various inquiries to ascertain the financial condition of William Miller. So far as I can find, he is insolvent, and so far as there is general repute upon that subject in this county, it is to the effect that he has no available assets from which any considerable debt could be made." As bearing upon William Miller's

insolvency the record of two judgments were introduced in evidence, one in favor of the State Bank of Nebraska, rendered on the 22d of January, 1872, in a contested case, and which was "satisfied without execution," (see Record, pp. 91 to 106), and the other in the case of Herman Koontz, in a suit commenced at the May term, 1874, of the Atchison county circuit court, and judgment rendered in September, 1874. This last suit was to foreclose a mortgage in favor of Koontz, executed on July 11, 1873, upon the lands included in the deed of trust of November, 1873, for the benefit of Mrs. Miller; and also upon 160 acres of land not included in Mrs. Miller's deed of trust. Judgment was rendered in that cause on September 24, 1874, for $2,071.20 and for foreclosure of the mortgage. This judgment was assigned by Koontz on January 30, 1875, to Joseph Patterson, and afterwards, on December 30, 1875, assigned by Patterson to the appellee, Eli J. Saeger. It is not, we understand, contended but what this is a valid lien against the lands mentioned, and that Saeger is the holder thereof. (Record, pp. 81 to 90.)

Shortly prior to the assignment of the Koontz judgment to Saeger, viz., in October, 1875, Saeger also procured an assignment to him of the deed of trust and the debt thereby secured in favor of Mrs. Miller sought to be set aside in the suit (Record, pp. 135, 136). And afterwards, on January 3, 1876, Mrs. Miller and her husband endorsed upon said deed of trust of November 10th, 1873, the following:

"I, Mary Miller, and William Miller, her husband, do hereby, and for and in consideration of the sum of twelve thousand dollars, assign, transfer, and set over to Eli J. Saeger the within deed of trust, and all interest in the debt thereby secured, this 3d day of January, 1876.

"MARY MILLER.
"WILLIAM MILLER."

On January 3d, 1876, William Miller and his wife conveyed to M. H. Horn and V. W. Weaver the property which had been levied upon in the attachment suit and described

in the deed of trust of November 10, 1873, in favor of Mrs. Miller, and then held, as recited in the deed, by Eli J. Saeger (Record, pp. 58 to 60). The consideration expressed in this deed was $36,400. That deed also included forty acres of land in Nodaway county, Missouri. The parties interested in this purchase were Horn and Weaver, and also Eli J. Saeger and the National Bank of Catasauqua, and the consideration was made up as follows: A debt of $3,000 from Miller to Horn, Weaver, and Saeger for rent of the Ramsey farm; debt due the National Bank of Catasauqua, $6,000; debt due Eli J. Saeger, $12,000; William Miller's notes, $8,000; note of William Miller to A. Enigh, about $1,500; claim of Van Sycle against William Miller, about $700; claims of Koontz and Patterson, about $4,000. Out of the purchase-money expressed in the deed there was a reservation of about $6,000 on account of liens upon the land, and to provide for defects in the title. At the time of taking this deed, in January, 1876, it was understood that the assignment of the Koontz judgment was to provide against contingencies that might arise, and the same was intended to be kept in force. The $12,000 mentioned as due to Eli J. Saeger, and which constituted a part of the aggregate consideration named in that deed, was the same indebtedness on account of which Saeger had taken the assignment of the deed of trust from Mrs. Miller, and it was the intention of the parties at the time that Saeger should retain that lien in force and have the benefit thereof. (See the testimony of Horn, Record, pp. 93 to 95, and also testimony of Eli J. Saeger, Record, pp. 182 to 185, and Record, pp. 126 to 132.)

The $12,000 consideration from Saeger for the assignment of the deed of trust in favor of Mrs. Miller arose from personal matters of his, in which none of the other defendants were interested, and was for moneys which he had paid out upon notes of Miller and upon which Saeger was bound as security or endorser. They were entirely different matters from the $3,000 due for the rent of the Ramsey farm above men-

tioned, and from the other items of the consideration for the purchase of said lands in January, 1876, as above stated, nor were they for any part of the Jay Cooke & Co. notes, nor for the Penn Life Insurance Co. debt. (See Record, p. 131.)

On September 16, 1876, the property was sold under said deed of trust and bought in by said Eli J. Saeger (Record, p. 137), and in December following he was made a party to this suit, as before stated.

The plaintiffs had filed a notice of the pendency of this suit in October, 1874, and, except the constructive notice therefrom, neither Saeger nor the other parties subsequently made defendants had any notice or knowledge of the claim set up by the appellants against the validity of the deed of trust in favor of Mrs. Miller until the day of the sale under the deed of trust, when the attorney for the plaintiffs read a notice of the pendency of this suit. (Record, p. 124.)

After reading the notice the attorney for the appellants bid upon most, if not all, of the land at said sale, (Record, p. 64). Judgment having been rendered in favor of the appellants against William Miller in their attachment suit in May, 1876, and the same having been affirmed by the supreme court of the State of Missouri in May, 1879, they caused a sale under execution to be made in September, 1879, of the 160 acres which had been omitted from the deed of trust to Mrs. Miller, and realized thereon the sum of three thousand and fifty-seven and $\frac{20}{100}$ dollars, beside the costs of suit. (See plaintiffs' amended bill, Record, p. 25.)

On January 5, 1883, the court entered an interlocutory decree in this case, wherein it was ordered and decreed that the deed of conveyance from defendants William and Mary Miller to defendants Malchor H. Horn and Valentine W. Weaver, of January 3, 1875, for the lands in controversy be declared void and set aside; that the deed under the trustee's sale, made in September, 1876, by virtue of the deed of trust of November 10, 1873, to Patterson, as trustee for Mrs. Miller, be declared void and set aside. The cause was re-

ferred to a master to take and state an account of all the rents and profits of all said real estate since the defendants, or any of them, had been in possession thereof; and also of the permanent improvements and repairs made by defendants, and of all taxes paid by defendants on said lands, with the further order that on the coming in of the report an order of sale should be made for all of the lands mentioned in complainants' bill, including the forty-acre tract in Nodaway county, which was subject to the lien of the judgment of Henry Koontz, and excepting from said sale the 160 acres heretofore sold under the judgment of the complainants, and proceeds of which have been received by them; the proceeds of said sale and the net amount of rents and profits, if any, received by defendants, after deducting the value of the improvements and repairs made and taxes paid, to be distributed as follows: First, to the payment of any and all taxes found due and unpaid on said lands; second, to the payment to the defendants holding the same the amounts due and unpaid on said Koontz's judgment, and the amount due and unpaid on the judgment of Van Sycle against William Miller, held by said defendants; third, the sum of $12,000, with interest from January 3, 1876, to defendant Eli J. Seager, the amount for which said deed of trust of William and Mary Miller to said William L. Patterson on said lands was assigned, for which said sum said deed of trust is declared a valid and prior lien on said lands against complainants. (Record, pp. 38, 39.)

After the coming in of the master's report and the consideration of exceptions filed thereto the final decree was entered in this cause, in August, 1883, to the following effect:

"That the judgment and mortgage debt which was a lien upon the land in controversy in favor of one Henry Koontz and which was paid by the assignment to the defendants Horn and Weaver, and the lien in favor of one Van Sycle, also paid and assigned to said defendants Horn and Weaver, are valid and subsisting liens upon said lands as against the

said complainants, and that the said defendants are entitled to be paid the same in preference to the claims of any other parties to this action; that the amount of said Koontz judgment was the sum of $2,070, with six per cent. interest from September 29, 1874, to May 29, 1883, less one-fourth of said claim otherwise satisfied, as hereinafter decreed, the Van Sycle claim of $700, with interest at six per cent. from January 3, 1876.

"And it is further ordered and decreed as to the claim of Eli J. Saeger, founded upon the deed of trust made by William Miller to defendant Patterson in deed of trust for defendant Mary Miller and assigned by said Mary Miller to defendant Saeger, is a valid and subsisting indebtedness and lien upon said lands in favor of said Saeger for the full amount expressed in said deed of trust, to wit, $16,000, with interest thereon from the 25th day of June, 1871, till the date of the filing of said master's report, at the rate of six per cent. per annum, and said interlocutory decree, so far as it relates to the amount of said Saeger's lien and preference, is modified and amended so as to allow to him the full amount of said assigned debt, as above ordered, and said Saeger is hereby declared entitled to be first paid the amount of said debt in this accounting after the satisfaction of said claims originally held by Koontz and Van Sycle as aforesaid.

"And it is further ordered and decreed that one-fourth part of the amount of said Koontz' mortgaged judgment ought to be, and is hereby, declared to be satisfied out of the southeast quarter of section 24, township 66, range 39, said land having been purchased by the defendants herein upon an execution sale based upon complainants' judgment recovered against William Miller, which sale was subject to said mortgage judgment, and said one-fourth part being the proportion which said lands should bear of said judgment debt."

(This is the 160 acres omitted from the deed of trust in favor of Mrs. Miller.)

"And the court doth further declare and find that upon computing the interest upon said several claims above adjusted and in the order above named, with annual rents, and applying as credits thereon, on the first day of February of each year the rents and profits accrued to defendants as

shown by the master's report herein. (After deducting therefrom the taxes and improvements on said land paid and made by defendants), and after deducting from said Koontz' judgment the one-fourth part thereof borne by and charged to the southeast fourth of section 24, as aforesaid, there is due upon said Koontz judgment $2,344.29 at the date of the master's report herein; and the Van Sycle debt and lien has been fully paid off to defendants, and upon this accounting nothing remains due thereon by reason of its liquidation in the manner aforesaid; and, further, that applying the remainder of the rents and profits reported by the master as aforesaid after the satisfaction of said Van Sycle debt, and after the credit of said debt and lien of said Saeger, a balance remains due to said Saeger on account of his said debt and lien of $21,529.64, which becomes and is hereby declared to be a prior lien upon the real estate described in the deed of trust assigned to him by Mary Miller as aforesaid, subject to taxes hereinafter mentioned, and any balance which may be due on the said Koontz mortgage judgment after applying to its satisfaction the 40 acres in Nodaway county hereinafter described."

The court also ordered the sale of the 40 acres in Nodaway county, the proceeds to be applied towards the satisfaction of the Koontz judgment; and also the sale of the lands described in the deed of trust to Mrs. Miller, the proceeds to be applied—first, on the taxes remaining unpaid on said lands; and, second to any balance remaining on said Koontz judgment after applying the proceeds of the Nodaway county land; and, third, to Eli J. Saeger the amount declared to be due him, as above stated, with six per cent. interest thereon from May 20, 1883. (Record, pp. 47 to 50.)

BRIEF.

The contention of the appellants that the deed of trust of November, 1873, in favor of Mrs. Miller is fraudulent must rest upon the single ground that it was voluntary. There is an utter lack of evidence in this case to establish any

fraudulent intention or purpose on the part of William Miller in making that deed, much less of any purpose of participation in any fraud on the part of Mrs. Miller in receiving the same. In fact, the appellants do not seem to seriously urge that there was any actual fraud in the transaction, but content themselves with endeavoring to show that the deed of trust was made without a valuable consideration, and in order to reach that conclusion they claim that William Miller was not indebted to his wife at the time of making it, because the money which had been used in payment of his debts was not his wife's money, but under the technicalities of the law had become his before its actual appropriation to the satisfaction of his indebtedness. They further contend that, although these several sums of money were the proceeds of sales of land to which Mrs. Miller held the title, yet that those lands did not belong to her, because they had been paid for by William Miller with his own money. It may be conceded, for the purposes of this case, that William Miller did pay the entire consideration for the several pieces of property conveyed to his wife in Catasauqua, and also for the Ramsey farm in Missouri; the fact, however, of such payment by him did not necessarily defeat the estate of his wife in those lands. It must be borne in mind that these several pieces of land were conveyed to Mrs. Miller in the years 1865, 1866, 1868, and 1870, respectively, and that during those years William Miller was a man of considerable means, engaged in prosperous and lucrative business and free from debt. Under such circumstances he had the unquestionable right to convey his property to his wife, or to purchase lands for her, and pay for the same with his own money. Even if he had contracts at that time, it would have been necessary to show affirmatively that his conveyances to or purchases for his wife were made with the intention of defrauding such creditors as he might have then had, but as to creditors, such as the appellants in this case, who did not become such until nearly four years after the last

and nearly eight years after the first purchase was made, it can hardly be pretended that such fraudulent intention existed.

In Lloyd *vs.* Fulton, 91 U. S., 479, this Court said:

"The rule, as now established, is that prior indebtedness is only presumptive and not conclusive proof of fraud, and this presumption may be explained and rebutted. Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud, there is no infirmity in the deed. Each case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test."

And again, in Smith *vs.* Vodges, 92 U. S., 183, it was said:

"In order to defeat a settlement made by a husband to his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene, the settler purposing to throw the hazards of business in which he is about to engage upon others instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable."

See also Sexton *vs.* Wheaton, 8th Wheat., 229.
Mattingly *vs.* Nye, 8th Wall., 370.

In the United States Trust Company *vs.* Sedgwick, 97th U. S., 304, it was said:

"The turning point in this class of cases is always whether there was fraud in fact. The result depends upon the solution of that question. When one engaged or about to engage in any business has the means to meet its usual exigencies, and devotes such means in good faith to the business, and has besides other means, which he chooses to settle upon any object of his bounty, unlooked for disasters on his part, subsequently occurring, will not affect the validity of the settlement, because they afford no ground for the imputation of unfairness."

In Jones *vs.* Clifton (101 U. S., 225), this Court, speaking through Mr. Justice Field, held that "the right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable. Its exercise is upheld by the courts as tending not alone to the future comfort and support of the wife, but also through her to the support and education of any children to the marriage." The deeds in that case were executed in October 1872, and April, 1873, and the grantor husband became hopelessly insolvent through the shrinkage in values and losses resulting from the general financial panic which passed over the country in 1873, which was likewise the cause of the misfortunes of the husband of Mrs. Miller in this case.

The same judge, speaking for this Court in Moore *vs.* Page, 111 U. S., 117, used this language:

"It is no longer a disputed question that a husband may settle a portion of his property upon his wife if he does not thereby impair the claims of existing creditors and the settlement is not intended as a cover to future schemes of fraud. The settlement may be made either by the purchase of property and taking a deed thereof in her name or by its transfer to trustees for her benefit."

In Clark *vs.* Killian, 103 U. S., 766, Clark, a subsequent creditor, attacked a voluntary conveyance to the wife of his debtor Schlorb, and Mr. Justice Harlan, speaking for the Court concerning those conveyances, said:

"They were all made before Clark had any dealings with Schlorb, and when, so far as the pleadings in that case discloses, there were no creditors who could complain of any such disposition by Schlorb of his property. The answers denied the allegations of fraud, and there was no evidence to overcome the denials. Clark's dealings with Schlorb were all subsequent to those conveyances, and therefore he could not have given credit to Schlorb upon the faith of his ownership of that property. The pleadings in that case do not

authorize the conclusion, as matter of law, that Schlorb had conveyed or caused to be conveyed the title to that property with the fraudulent intention of thereafter engaging in business or having business transactions, and, in the event of financial embarrassment arising therefrom, to withhold it from his creditors.

And so in the case at bar the answer denied all fraud in any of the transactions; the pleadings do not warrant any conclusions adverse to the title of Mrs. Miller, nor was there any attempt on the part of the appellants to show by evidence any fraudulent intent in the making of those deeds, but, on the contrary, the evidence brings the circumstances surrounding the conveyances of these several pieces of property to Mrs. Miller within the rule enunciated by this Court in the cases above cited. The same rule prevails in Missouri.

Lane *vs.* Kingsbury, 11th Mo., 402.
Payne *vs.* Stanton, 59th Mo., 158.
Burgess *vs.* McLean, 85 Mo., 678.

And also in Pennsylvania.
Townsend *vs.* Maynard, 55th Pa., 198.

And such being the rule in the States where the property was situated it will be applied by this Court.
Lloyd *vs.* Fulton, *supra.*

The case of Seitz *vs.* Mitchell, 94 U. S., 582, is not in conflict with the above cases. In that case judgment was rendered against the husband in 1868, and the property was purchased in the wife's uame in 1870. Under such circumstances the burden of proof would shift and the wife would be required to prove that the purchase was made with her own money, because the husband, with a judgment and execution standing over him, will not be permitted to consume his assets in the acquisition of an estate for his wife.

The case of Parish *vs.* Murphree, 13 Howard, 92, admits

the right of a husband to make a settlement upon his wife which would not affect his creditors at the time; and the court considered the fact of the conveyances being voluntary as one of the circumstances in the case, to be taken into consideration with the others, in determining whether or not the transaction was fraudulent. In that case the husband was largely indebted, and had been for some time prior to making the conveyance to his wife, and in a very short time afterwards twenty-seven judgments were rendered against him. He conveyed the bulk of his valuable estate to his wife without consideration, sent a large amount of other property out of the State in which he resided and did business. He then established several other stores, claiming to have large assets, but which the court found to consist of comparatively worthless property at greatly exaggerated values. Upon these facts the court very properly found that the conveyance to the wife was made in fraud of the creditors. And so in the case of Fisher *vs.* Lewis, 69 Mo., 629, the court, considering the fact that a conveyance to the children of the grantor was voluntary, in connection with the other evidence, found that the conveyance to the children was made with the intention of defrauding the creditors in a hazardous business enterprise, upon which the grantor entered at about the time of the making of the deed.

Under these authorities and the evidence in this case there should be no question as to the validity of the several conveyances made to Mrs. Miller of the several pieces of property above referred to, and even within the rule above laid down, if the deed of trust which is assailed in this case had been a voluntary gift from Miller to his wife, as claimed by the appellants, it would have been valid as against these appellants, for, although he had shortly prior to the making of that deed of trust entered into a contract with the appellants from which liabilities might arise, still the evidence shows that at that time he was possessed of large resources

from which he could reasonably expect to provide for any possible contingencies that might arise under his contract with the appellants independent of the lands upon which this deed of trust was given. It is not to be supposed that he at that time anticipated the reverses and misfortunes which were to overtake him as a result of the failure of Jay Cooke & Company. But it is not necessary to rest the validity of the deed of trust to Mrs. Miller upon the doctrine of the above cases, because, as the appellees claim, *that* was not a voluntary transaction or settlement by Miller upon his wife, but was made upon a full and valuable consideration. Mrs. Miller, being possessed of these lands, was entitled to dispose of them in such manner as she pleased, with the concurrence of her husband, and if she used them as security for her husband or in payment of his debts, and the deed of trust was made to her on that account, it was certainly not voluntary. That the deed was made upon such consideration we think we can clearly show. The appellants concede that the proceeds of the sales of these several pieces of property to which Mrs. Miller had the title were used in the satisfaction of certain debts of William Miller, but in the discussion of that branch of the case they fail to notice several important facts, and treat the proceeds of those sales as being exclusively the money or property of William Miller himself. That conclusion is arrived at by the appellants upon the theory that Mrs. Miller did not have a separate estate in this property, and that, under the common law, money arising from the sale of the wife's land at once became the property of the husband.

The deeds to the property in Pennsylvania created a separate estate in equity in Mrs. Miller.

Gould *vs.* Hill, 18 Alabama, 84.
Heck *vs.* Clippenger, 5 Pa. St., 385.
Tyson's Appeal, 10 *Id.*, 220.
Hartley *vs.* Hurle, 5 Ves., 540.

The word "proper" is here to be construed "own."
Tyler *vs.* Lake, 2 Russ. & My., 188.

While the deed to the "Ramsey farm" in Missouri did not contain words that would create a separate estate in equity, it did create in Mrs. Miller a separate statutory property, under revised statutes of Missouri, sec. 3295. By virtue of this statute the lands in Missouri which a married woman holds and owns generally, and without limitation, are as free from the control and disposition of her husband as her separate estate in equity. The only practical distinction that exists at present under the statutes and decisions of Missouri is that as to the separate estate in equity the wife is regarded as a *feme sole*, and may bind that estate by her contracts, which she cannot do as to her statutory separate property. She may, however, encumber the one as well as the other by a mortgage or deed of trust, and the same formalities are required for the execution of such deeds as to both classes of property. She may also use her property—whether it be her separate estate in equity or her statutory estate—to secure the debts of her husband, and no distinction is made as to the relief that she may have on account thereof. The appellants contend, however, that there is a distinction between the two kinds of property concerning the right of the husband to the proceeds of sales. The section of the Missouri statutes above referred to provides as follows:

"The rents, issues, and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such real estate, and the interest of her husband in her right in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance during coverture, shall, during coverture, be exempt from attachment or levy of execution for the sole debts of her husband."

It seems to be conceded by the appellants, as well as by the authorities upon which they rely, that if the property which may be sold and converted into money was acquired from any one other than the husband, or was purchased with money which the wife derived from any other source

than her husband, then the proceeds of such sale would be as free from the control and ownership of the husband as though the land had been her separate estate in equity; but the appellants claim if the land had been purchased with money which the wife acquired by gift from the husband, then, upon a sale of that land, the proceeds at once became the property of the husband. That such distinction cannot be drawn from the statute in question must be apparent upon reading it.

Unlike the statutes of the District of Columbia and of some of the States, the Missouri statute does not except from its operation gifts or grants from the husband. It is true that in the case of Sloan *vs.* Torry, 78 Mo., 623, a construction was given to this statute similar to that contended for by the appellants. While we understand that this Court will usually follow the construction given to a State statute by the courts of that State, yet we submit that this Court is not bound by a decision of the State court which is clearly erroneous or is the result of inadvertence. An examination of the case of Sloan *vs.* Torry will show that the construction of that statute was not a necessary question to the determination of that case, for there, as in the case of Tillman *vs.* Tillman, 50 Mo., 40, the proceeds of the sales, having become the personal property of the wife, were, as the law then stood, subject to be reduced to possession by the husband and thus become his property, and in both of those cases the husband had so reduced the money to his actual possession and used it for a long time in his business; but, with all due respect to the court deciding the case of Sloan *vs.* Torry, we submit that its construction of the statute was erroneous. The opinion in that case was predicated upon the case of Sumner *vs.* McCray, 60 Mo., 493. In the latter case it was decided that where the husband received a check given for the purchase of land owned by the wife prior to marriage such check was exempt from execution for his debts. There it appears that the only question was as to a sale of lands which the wife

owned before marriage, and the court was not pretending to pass upon the right of either spouse to the proceeds of her lands acquired after marriage. Having decided the case, the judge who wrote the opinion, in speaking of the statute above referred to, inadvertently, we suppose, used the words "with her own money," in speaking of property acquired by gift, grant, devise, or inheritance after marriage. This was a clear interpolation upon the statute, and without any discussion of the subject the court, in Sloan *vs.* Torry, adopted that expression in Sumner *vs.* McCray as though it had been a direct construction of the statute upon this particular point now raised by the appellants. The statute does not undertake to limit or qualify the rights of the wife according to the source from which she may have obtained the land or the money with which she buys it, and by its terms it protects her estate acquired by gift or grant from her husband as fully as that acquired from any other person; and, further, when the statute is properly read it will be observed that there are two clauses designed to secure to the wife rights which she did not have at the common law. In the first place: "The rents, issues, and products of the estate of any married woman and all moneys and obligations arising from the sale of such estate shall be exempt," etc.; and then, in the second clause: "The interest of her husband in her right in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance during coverture, shall be exempt," etc. Most certainly the phrase, "which she may have acquired by gift, grant," etc., relates to the interest of her husband in her real estate, and not to the former clause of the section. Concerning the interest of the husband in her lands, provision is made for those which belonged to her before marriage and for those acquired afterwards, but in the first clause it is said generally that the rents, etc., and the proceeds arising from the sale of the real estate of any married woman shall be exempt. This is broad enough to cover and does cover

any real estate which she may own, whether acquired before or after marriage, and no matter from what source acquired. To make the phrase in regard to a gift or grant relate back to the first clause of the section, it should read: "The rents, issues, and products of the real estate of any married woman and all moneys and obligations arising from the sale of such real estate which she may have acquired by gift, grant, devise, or inheritance during coverture shall be exempt, &c." And, by thus construing the section, it is made to apply only to her lands acquired after coverture, and her real estate which she owned before she was married would still be subject to the rules of the common law. Such, undoubtedly, was never intended by the law-maker. We think, therefore, that the case of Sloan *vs.* Torry is wrong in this particular, and that the proceeds of the wife's real estate, even though acquired after marriage by gift or grant from her husband, stands upon the same footing as the proceeds arising from the sales of any other land owned by her. The other citations made by the appellants upon this subject are not in point, for the reason that they assert the rule, in regard to the husband's rights to the wife's real estate, at common law. Such will be found to be the quotation from Schouler on Domestic Relations when compared with the context. The case of Kesner *vs.* Trigg, 98 U. S., 50, arose in the State of Virginia while the common law was still in force (the first married woman's act having been passed in that State in 1877), and the court, in deciding that case, said: "So, by the common law, if the husband and wife sell and convey her land, and he receive the consideration money without any reservation of rights on her part, the money belongs to him." And so in the case of Hamlin *vs.* Jones, 20 Wis., 536, the court remarked that "by the principles of the common law the money arising from the sale of the wife's land belonged to the husband." But, as the common law does not control in regard to the lands of Mrs. Miller in this case, these authorities cited by the appellants can have no

force. Even if Mrs. Miller had not had a separate estate in equity in the Pennsylvania property, as is contended by the appellants, still the proceeds would be protected under the statute of Missouri, as was expressly decided in the case of Sumner *vs.* McCray, *supra.* There may be circumstances, of course, under which a married woman would not have the right to the proceeds of her property, whether it be her separate estate in equity or her statutory separate property; as, for instance, if she were to allow her husband to take the actual possession of such money and mingle it with his own funds in his general business, or to acquire other lands with it, and to so continue in the use of it for a long period of time as to acquire credit upon the faith of his ownership from unsuspecting parties. Such was the case of Humes *vs.* Scruggs, 94 U. S. 22, where the wife permitted her husband to take her money and use it for the express purpose of acquiring credit in his business, and then, when he afterwards became insolvent he was not permitted to convey his property to her, to the exclusion of his creditors, upon the pretext of refunding her money so used. In the case at bar, however, William Miller never received into his own possession a dollar of the proceeds of the property of Mrs. Miller. It may be said that technically he did receive it, or a part of it, when it was placed to his credit in the bank at Catasauqua, and that he used it, in a technical sense, when it was afterwards applied in payment of his debts; and that might, perhaps, be a proper view to take of the matter, if there was nothing else in the case. A court of equity, however, in determining the rights of parties, is not to be restricted by the narrow limits prescribed by the cold technicalities of the law; it will not be bound by the mere ceremonies and formalities of the transaction, but will go to the very substance, and will assert the rights as they are, or should be, from the real purposes and effects of the various transactions.

This brings us to an examination of the real nature, pur-

poses, and effects of the transactions resulting in the sale of Mrs. Miller's property and the application of its proceeds to her husband's debts. Being entitled, as before shown, to the ownership of that property beyond the possibility of being assailed on account of his debts contracted from four to eight years after she acquired it, she executed a mortgage upon that property, or that part of it in Pennsylvania, in December, 1870, as security for the Jay Cooke & Co. loan. If that mortgage had been regularly foreclosed by suit, and her property sold and applied to the satisfaction of the debt secured, no question would be made but that the proceeds had never become the property of her husband or that she would be entitled to relief on account of such sale of her property. Instead, however, of a foreclosure at that time she sold the lands in Missouri upon which, it is true, she had not given any mortgage, and with the proceeds paid a part of the Cooke & Co. debt. A new loan was negotiated with the Penn Insurance Company for $12,500, which was also secured by a mortgage upon her Pennsylvania property, and with the proceeds of that loan the Jay Cooke debt was paid off; and a little later, instead of foreclosure by proceedings in court, the parties who were holding these mortgages for the insurance company proposed to effect private sales of the property. To this she consented, and authorized the sales to be made and the proceeds applied in satisfaction of that debt, which was done. It certainly makes no difference in the result that this was accomplished through private transactions instead of by means of foreclosure proceedings in court, and it would be a strange rule that would require a court of equity to insist that the wife whose property was encumbered for her husband's debts must submit to the delay and the great expense of foreclosure proceedings before she could be recognized in such a tribunal upon the claim of having devoted her property to the debts of her husband. This was not a sale in the ordinary way, where it might be claimed that she had permitted the money

arising therefrom to go into the general control of her husband, but it was made for the express purpose of paying the debt of her husband for which the property already stood encumbered, and the substance of the matter was the same as though the mortgages had been regularly foreclosed. And, as to the "Ramsey farm," in Missouri, there never was, it is true, any mortgage upon it, but Mr. Saeger, who was the endorser upon the note to Jay Cooke & Co., and Mr. Horn, the cashier of the bank through which these negotiations for the different loans were made, proposed to buy that farm in order to realize money to pay upon the Cooke debt. It would have been entirely competent for Mrs. Miller to have given a mortgage or deed of trust upon that land to secure this debt, and, if she might make a conditional sale for the purpose of securing or satisfying it, most certainly she could make an absolute sale and apply the proceeds directly to the payment of the debt; it was simply a more direct and speedy way of attaining the same end. And here again the substance of the matter is that the same thing was accomplished as would have been by the slow process of giving a mortgage and foreclosing it in court. In regard to these several sales of her property it cannot be pretended that Mr. Miller received the proceeds himself; but, even if he had, it certainly should make no difference, if the sales were made for the purpose of realizing money to pay the Cooke debt, and it has been so applied. The only foundation for the claim that the money became his is that the bank, which had charge of the matters, presumably for the purpose of convenience and of keeping a record of the transaction, entered the different amounts to the credit of William Miller on the books of the bank and then charged up his account with the amounts paid out in satisfaction of the very debt for which the sales were made. It would certainly be very far from the spirit of these transactions to say that they amounted to anything else than the satisfaction of Miller's debts from the proceeds of his wife's property.

No mere legal technicality can require a court of equity to close its eyes to the real facts and the real intention of the parties and say that the entries upon the books of the bank, concerning which probably neither Mr. nor Mrs. Miller had any knowledge, must preclude her from the relief that she would otherwise have.

The appellants, in their statement at page 16, say: "That no part of the Jay Cooke & Co. note was paid by Saeger, and therefore he never became a creditor of Miller's." And that is true as far as it goes, but it is not a full statement of the matter. It implies that Miller himself paid that debt, whereas a candid statement of the transaction would have been that neither Saeger nor Miller paid it, but that it was paid out of the proceeds of Mrs. Miller's property. Having so used her own property for the satisfaction of her husband's debts, she occupied the position of his creditor; she stood in the relation of a surety, who had paid the debt of the principal, and occupying that position she was entitled to be indemnified from the property of the principal, and could have resorted to a court of equity and compelled repayment to her out of the property of her husband. Her right was as valid in law as that of any other creditor.

Neimcewicz *vs.* Gahn, 3 Paige, 614; S. C., 11 Wend., 312.
John *vs.* Reardon, 11 Md., 465.
Terry *vs.* Wilson, 63 Mo., 498.
Payne *vs.* Twyman, 68 Mo., 339.
Wilcox *vs.* Todd, 64 Mo., 388.
Story's Eq., 12 Ed., Sec. 1373.
Jones on Mort., Sec. 14.

And it is immaterial whether the property of the wife which has been used in satisfaction for her husband's debts was her separate estate in equity or not.

Wilcox *vs.* Todd, *supra.*

And because Mrs. Miller was entitled to such relief, her husband only did what a court of equity would have compelled him to do when he secured her by the deed of trust upon his property which is in controversy in this suit; and even if at that time he had other creditors, still, as his wife was a *bona fide* creditor, he might prefer her.

Hoes *vs.* Boyer, 9 N. E. Rep., 47.

The appellants urge against the validity of this deed of trust that at the time of making it the husband had entered into a contract with them, upon which he was at the time of the making of the deed of trust somewhat indebted, and that afterwards that indebtedness was considerably increased. It may be remarked, in the first place, in regard to this claim of the appellants, that there is no evidence in the record to establish the fact of such indebtedness at that time.

The judgment which the appellants obtained against William Miller in 1876 was read in evidence, it is true, but as to Mrs. Miller and all the other defendants in this case except William Miller that judgment was *res inter alios acta.* It was competent evidence to prove the fact that such judgment had been rendered, and thus to show that the appellants were creditors of William Miller; but as to the ulterior facts concerning the time at which the indebtedness accrued it was not any evidence against the defendants other than William Miller (1 Greenleaf on Ev., secs. 527, 538, 539). At the most, that judgment only showed, as to these defendants, that a judgment had been rendered against William Miller in 1876 in a suit instituted in October, 1874. But even if there had been proper evidence in the case to show that William Miller was somewhat indebted to the appellants at the date of his deed of trust to his wife, that fact would have been immaterial in this case, for it must not be overlooked that in September, 1871, when William Miller renewed the note for the loan procured from Jay Cooke & Co., upon the endorsement of the appellee, Saeger, he gave

to Saeger, as security for that indebtedness, a mortgage upon the same lands included in the deed of trust afterwards made to Mrs. Miller and in controversy in this suit. The existence of that mortgage to Saeger has been wholly ignored by the appellants in their discussion of the case, except when they say that as Saeger never paid the Cooke debt, therefore he never became Miller's creditor, and hence acquired and held no rights under that mortgage; but this is ignoring a principle frequently resorted to by courts of equity. By the endorsement of the note to Jay Cooke & Co. by Saeger, and by the mortgages which Mrs. Miller gave upon her property, they became co-sureties for the indebtedness of William Miller, and, therefore, when one or the other of them satisfied the indebtedness of the principal that one became entitled. in equity to the benefit of any security which the co-surety had received from the principal. Hence, when Mrs. Miller satisfied the indebtedness to Jay Cooke & Co. from the proceeds of her real estate she at once became entitled to be subrogated to all the rights and benefits of the mortgage given to Saeger in 1871 (Story's Eq., sec. 499). As Mrs. Miller could have resorted to a court of equity to avail herself of the benefits of that mortgage, there can be no just complaint made against the deed of trust which her husband gave her in 1873 on account of the very same transactions. The result was the same, the only difference being in the method of attaining that end, and surely a court of equity will not now say that the result accomplished by the parties themselves without the delay and expense of a proceeding in court is void, when, if the resort had been to the court, practically the same thing would have been done. That mortgage of 1871 has never been satisfied, unless it be by the deed of trust given to Mrs. Miller in 1873, and if that deed of trust to her is now declared invalid it would simply throw her back upon the mortgage of 1871, to the benefits of which the court would undoubtedly subrogate her, and the same end would be ac-

complished as by sustaining and enforcing the deed of trust made in 1873.

The appellants have indulged in some criticism of the provisions of the deed of trust of 1873; for instance, that it recites that it was given to secure her for money which had been used by her husband in the payment for the real estate covered by the deed of trust. This, the appellants say, is false. It is true that the evidence is meagre as to the particular use of that money, but the only evidence upon the subject is that of the appellee, Saeger, who testifies that when the loan was procured from Jay Cooke & Co. it was obtained, in part at least, for the purchase of this identical real estate. But whether it was so used or not is wholly immaterial. That it was obtained by Miller, and an indebtedness incurred by him on account thereof, is not disputed; nor is it disputed that Saeger endorsed the note and thereby became a surety for the debt; nor that Mrs. Miller mortgaged her property for the same debt; nor that Miller mortgaged the lands in controversy as security to indemnify Saeger for his liability on that debt. Under these circumstances it is foreign to the consideration of Mrs. Miller's rights to inquire how her husband used the money thus procured; it is sufficient to know that he did become indebted in that manner, and that the indebtedness was satisfied out of her property.

The appellants also assume to discover a badge of fraud in the fact that the amount of the indebtedness to Mrs. Miller is fixed at $16,000, with interest thereon from June the 25th, 1871. Just why that particular date was fixed or adopted for the calculation of interest, or why that sum, instead of the whole amount that had been realized from Mrs. Miller's property, was mentioned is not explained. In the evidence it does appear that the land which is involved in these deeds of trust and mortgages was purchased in small tracts, from various persons, at different times, and it may be that there was an effort to take an average date from which

to calculate interest, or it may be that the date was adopted by reason of being one of the periods of renewal of the note to Jay Cooke & Co., which seems to have been drawn at ninety days and renewed from time to time, and the 25th of June, 1875, was about six months after the first note was given. Still that matter is also immaterial in this investigation, because the evidence does clearly show that a much larger amount than that secured by the deed of trust had been realized from the property of Mrs. Miller and used in payment of her husband's debts some time before the making of the deed of trust.

It is also complained by the appellants that Miller conveyed the property belonging to his wife without her knowledge and executed conveyances thereof under a power of attorney from her; and the appellee Horn is accused of attempting to mislead the court in a statement quoted from page 181 of the record. This was perhaps intended for the appellee Saeger, from whose testimony the quotation on page 37 of the appellants' brief is taken. Such an insinuation against the defendants to this suit or the transactions under consideration is utterly unfair, in the light of all the evidence, and is wholly unsupported by the facts as disclosed in the record. The only instrument executed by Miller under the authority of the power of attorney from his wife is the mortgage given upon her property to Saeger in December, 1870. It appears from that mortgage, at page 141 of the record, that at that time Mrs. Miller was residing in Omaha, in the State of Nebraska. During the same month her husband had gone to Pennsylvania to negotiate the Jay Cooke loan through Saeger, and while there he did procure that loan and executed the mortgage upon his wife's property at that place, it being attested by one Hammersley, who was the same notary public, at Catasauqua, who took the depositions in this case. That Mrs. Miller executed and acknowledged the power of attorney under which that deed of trust was executed there is no dispute, and the only reasonable infer-

ence to be drawn from these circumstances is that she must have understood that the power of attorney was to be used for some purpose, and being used, as it was, so nearly at the time, for making this mortgage, we can only reasonably conclude that it was her intention and purpose to assist her husband with the use of her property, and, not knowing when he left his home just what might be the demands or requirements of the negotiations upon which he was about to enter, she gave him sufficient latitude to enable him to consummate them without unnecessary delay.

As to the other conveyances of her property which were afterwards made for the purpose of satisfying her husband's indebtedness, as has already been shown, the deeds themselves refute the imputation of the appellants. The deed to the "Ramsey farm" (Record, pages 76 and 77) was executed by Mary Miller in her own proper person, as were the deeds to her property in Pennsylvania (Record, page 201; Exhibit "E," and page 205, Exhibit "G"). Concerning these deeds Mr. Horn, who negotiated the sales of the land, was asked by the appellants, on cross-examination, this question: "You may state who it was that wrote to you to sell Mrs. Miller's property in Catasauqua—Mr. Miller or Mrs. Miller?" and the answer was: "I am not certain whether they wrote to me or whether they told me to sell it, as they were both here at or about that time" (Record, p. 192); and an examination of those deeds, Exhibits "E" and "G," will show that they were executed in Catasauqua. The acknowledgments are not set forth, but the witnesses to those deeds, one of whom was John W. Zehner, appear, from comparison with other deeds in evidence, to have been residents of Catasauqua.

Such criticisms as the above should have but little weight in opposition to the equities of the wife arising upon the substantial fact of the use of her property in payment of her husband's debts. Fraud is not to be presumed, but a suspicious mind will discover it at all events. In this case the

appellants pretend to find proof of it in the irregularities which are likely to occur in all transactions. Had every act of the parties been done under the direction of skilled attorneys, with great particularity and formality, then the appellants would have rung the changes upon such circumspection as a badge of fraud, because honest men do not find it necessary to use so much ceremony. That under all the circumstances of this case the deed of trust to Mrs. Miller should be sustained as valid against the appellants we think there should be no question.

A similar case is to be found in Hitz *vs.* Nat. Met. Bank, 111 U. S., 722, except that was a much stronger case against the equities of the wife than the one at bar. There the husband was largely indebted and hopelessly insolvent before he made the conveyance to his wife, and he had used her property in his business, and had obtained credit upon it. Under the circumstances of that case the wife would have been entitled to relief if she had resorted to a court of equity, but without that expense and delay the husband afforded her the relief to which she was entitled by conveying his interest in certain property to her.

In rendering the opinion of the Court Mr. Justice Miller remarked:

"The case is wholly free from fraud. Mrs. Hitz had the same right to buy his (her husband's) courtesy in her real estate, to have it barred by a proper conveyance, as any one else had or could have had. Her equity was as good as any other creditor's, and he could secure her as well as he could secure the bank. As the present complainant had no lien upon the property, the joint right of husband and wife to sell it for value was undoubted, and the right to sell to her by the intervention of trustees is equally clear. The property she gave in exchange for his interest in her lots did not go to him to be secretly used in fraud of his creditors, but was conveyed directly to creditors in satisfaction of his debts. The conveyance was not without consideration and it was without fraud."

And in the case of Stewart *vs.* Platt, 101 U. S., 731, a similar transaction between husband and wife, without a resort to the courts to adjust the equities of the wife, was sanctioned.

No dispute is made but that the appellee, Saeger, paid a valuable consideration for the assignment of the deed of trust in controversy to him, and as there is no appeal from that part of the judgment of the court below annulling the conveyance to Weaver and Horn, made in January, 1876, and also annulling the sale, made in September, 1876, under the deed of trust of November, 1873, nor from that part which decrees the validity and enforces the lien of the Koontz and Van Sycle judgments, nor from that part of the decree which ascertains and applies the rents which were charged against the appellees as mortgagees in possession, and which fixes the amount due to the appellee, Saeger, it is unnecessary to further consider those questions here. The appellants submit this case upon the single question of the validity of the deed of trust of November, 1873. If that deed of trust is valid the judgment of the court below must be affirmed; upon that one issue the appellants stand before this Court. In their efforts to overthrow it the appellants have endeavored to restrict the attention of the Court to the circumstances immediately surrounding the execution of that deed of trust. They have urged an inquiry into the affairs of Mr. Miller at that immediate time, and asked the Court to consider this case with reference to the single question whether Miller was at that time in a condition which permitted a voluntary conveyance to his wife. In order to make it appear that this transaction was voluntary they have studiously avoided all those antecedent transactions from which the deed of trust emanated.

We again, however, direct the attention of the Court to the beginning of those business matters between Miller and his wife and his creditors, which have finally resulted in this litigation. We again urge upon the Court the fact that

Mrs. Miller acquired the "Ramsey farm" and the several pieces of property in Catasauqua from her husband at a time when he was not only free from debt but engaged in lucrative business, and that those conveyances were made to her at periods ranging from four to eight years anterior to the existence of any business relations between Miller and these appellants. Being possessed of that property, free from all taint of fraud and safe from all reverses that might afterwards overtake her husband, she had the right, both in law and in equity, to use and dispose of it as she might see fit. And we urge further upon the attention of the Court the very important element in this case, to which the appellants have closed their eyes and seem to wish to blind the eyes of the court, that in the exercise of her rights of ownership in that property she first encumbered it for the security of her husband's debts, and afterwards sold it and with the proceeds paid his debts, thereby establishing the relation of creditor to her husband, which entitled her to reimbursement from such property as he might at that time be possessed of. As such creditor her rights were as sacred in the eyes of the law as those of any other creditor, and her husband would have been justified in giving her a preference, as he might have done to any other creditor to whom he was indebted. And added to this is the further material fact that the identical property involved in the present controversy was mortgaged in 1871 to secure the very same debt to Jay Cooke & Co. which was afterwards paid out of the property of Mrs. Miller. That mortgage was never satisfied otherwise than by the payments made from Mrs. Miller's property, and in equity she became at once entitled to all the benefits of that mortgage. There cannot be even the pretense in this case that the appellants were induced to extend credit to William Miller upon the faith of any of the property which was afterwards consumed in satisfying the Jay Cooke & Co. debt, because the records disclosed to them that the "Ramsey farm" and the Catasauqua property be-

longed to Mrs. Miller and not to her husband. If they placed any reliance upon the lands now involved in this litigation when they made their contract, as alleged, in 1873, but as not shown by any proper evidence in this case, they must have done so simply upon the faith they might have had in its value above the mortgage to Saeger, of 1871, for it was there upon the records and imparted full notice.

Upon these facts, and under the rule applicable to such cases, so often declared by this Court, we submit the cause, in full confidence that the decree of the court below must be affirmed.

G. G. Vest,
For Appellees.